UNITED STATES OF AMERICA

DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES COAST GUARD

Complainant

vs.

KENNETH MAUSOLF

Respondent

Docket No: 08-0196
CG Enforcement Activity No: 3189540

DECISION AND ORDER

Issued: November 10, 2008

Issued by: HON. BRUCE T. SMITH,
Administrative Law Judge

Appearances:

For Complainant:
MST1 Russell A. Dorin
LCDR Daniel Silvestro
USCG Sector Key West
100 Trumbo Point
Key West, FL 33040

For Respondent:
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Marathon, FL 33050

PRELIMINARY STATEMENT

The United States Coast Guard (Coast Guard) initiated this administrative action seeking revocation of Kenneth Mausolf's (Respondent) Merchant Mariner's License Number: 1007435. This action was brought pursuant to the authority contained in 46 U.S.C. § 7704(c) and its underlying regulations codified at 46 CFR Part 5.

The Coast Guard issued its original Complaint on April 22, 2008, charging Respondent with use of or addiction to the use of dangerous drugs and further alleged Respondent had been convicted of violating a dangerous drug law in the past ten (10) years. Respondent, through counsel, filed his Answer with the ALJ Docketing Center on May 12, 2008.

On July 21, 2008, the Coast Guard filed a Motion to Amend its original Complaint plus an Amended Complaint. The Motion sought to amend certain names and dates specified in the original Complaint. The Amended Complaint also deleted the allegation of a violation of a dangerous drug law in the past ten (10) years. The undersigned gave no further consideration to that original allegation and did not speculate concerning that allegation in the resolution of this case. In the Amended Complaint, the Coast Guard alleges Respondent took a pre-employment drug test on April 8, 2008, and subsequently tested positive for marijuana metabolite.

The hearing commenced in Monroe County Courthouse, Marathon, Florida on September 18, 2008, at 9:00 a.m. (EDT); MST1 Russell A. Dorin and LCDR Daniel Silvestro represented the Coast Guard. Hal Schumacher, Esquire appeared on behalf of Respondent. At the hearing the Coast Guard introduced thirteen (13) exhibits into evidence; all were admitted. Respondent, through counsel, introduced three (3) exhibits into evidence; all of which were admitted. Nine (9) witnesses testified at the hearing, five (5) on behalf of the Coast Guard and four (4) on behalf of Respondent.

The Coast Guard and Respondent submitted post hearing briefs on October 2, 2008 and October 13, 2008, respectively. Unfortunately, neither party fully addressed the specific question posed by the undersigned regarding the definition of the term "user" as that term is used in 46 CFR § 5.59. In his concluding remarks, the undersigned specifically asked the parties for briefing on this issue; yet neither party complied as requested. (Tr. at 290-292).

The transcript of the hearing was provided to the undersigned on October 10, 2008.

FINDINGS OF FACT

The Findings of Fact are based on a thorough and careful analysis of the documentary evidence and the entire record taken as a whole, including party stipulations.

1. At all relevant times mentioned herein and specifically on April 8, 2008, Respondent, Kenneth Mausolf, was the holder of Coast Guard Merchant Mariner's License Number 1007435. (Complaint; See Transcript Generally).
2. On April 8, 2008, Respondent presented himself to the Keys Consortium Drug Testing Services, Incorporated (Keys Consortium), a urine specimen collection facility, to take a pre-employment drug test. (Tr. at 30–31; Gov't Ex. 3).
3. Maritza Larrazabal, an employee of Keys Consortium, was trained and certified as a urine specimen collector per Department of Transportation (DOT) regulations. (Tr. at 26–27).
4. On April 8, 2008, Ms. Larrazabal collected a urine sample from Respondent, separated the sample into two (2) samples labeled "A" and "B," packaged the samples, and then shipped the samples to Quest Diagnostics in Atlanta, George for testing. (Tr. at 31- 33, 54-55; Gov't Ex. 3, 5).

5. At the time Ms. Larrazabal collected Respondent's urine specimen, she recorded each step of the collection process on a DOT Custody and Control form (CCF), and assigned a unique specimen identification number to Respondent's sample. (Gov't Ex. 3). That unique identification number was 202601271089237. (Id.).
6. Quest Diagnostics, Incorporated is a certified DOT drug-testing laboratory. (Gov't Ex. 4).
7. Brad A. Brunelli, Ph.D. is the laboratory director at Quest Diagnostics, an appropriately-trained and educated toxicologist. (Tr. at 56-65).
8. On or about April 11, 2008, Quest Diagnostics conducted both an initial screening and a confirmatory test on the "A" sample bearing identification number 202601271089237. (Gov't Ex 5 at 63). Both the initial screening and confirmatory testing resulted in a finding of "positive" for the presence of tetrahydrocannabinol (THC), the psycho-active ingredient in marijuana. (Id.).
9. Quest Diagnostic's confirmatory testing revealed the "A" sample bearing identification number 202601271089237 contained 96 nanograms of THC per milliliter (ng/ml). (Gov't Ex. 5).
10. Quest Diagnostics reported the results of the tests conducted on the sample bearing identification number 202601271089237 to Keys Consortium and Dr. Seth Portnoy, a DOT-certified Medical Review Officer (MRO) employed by Total Compliance Network of Ft. Lauderdale, Florida. (Tr. at 115-118).
11. On April 11, 2008 at approximately 4:20 p.m., Dr. Portnoy telephoned Respondent and reported the certified, positive test results to Respondent. (Tr. at 119-21; Gov't

Ex. 11). Respondent offered no reason why his specimen had tested positive for THC. (Id.).

12. During his conversation with Dr. Portnoy, Respondent asked that his "B" specimen be tested by an independent laboratory. (Tr. at 122-23).

13. On or about May 14, 2008, Dr. Portnoy ensured Respondent's "B" sample was shipped by Quest Diagnostics and delivered to, and tested by, Advanced Toxicology Network, in Memphis, Tennessee. (Gov't Ex 8).

14. Advanced Toxicology Network is a certified DOT drug-testing laboratory. (Gov't Ex. 10).

15. On or about May 19, 2008, Advanced Toxicology Network performed both an initial screening and a confirmatory test on Respondent's "B" sample bearing identification number 202601271089237. (Tr. at 125–26, 132; Gov't Ex. 9). Those test results revealed Respondent's "B" sample contained 65 nanograms of THC per milliliter. (Id.).

16. On April 11, 2008, and after his conversation with MRO Dr. Portnoy, Respondent had a conversation with Ms. Jane Dorias regarding his positive urine test results. (Tr. at 204-06).

17. Jane Dorias is Respondent's neighbor and has known Respondent for at least the past four (4) years. (Tr. at 146).

18. Jane Dorias is an admitted user of illegal drugs and has been using marijuana for the past thirty (30) years. (Tr. at 173).

19. At some time after his conversation with Ms. Dorias on April 11, 2008, Respondent presented himself to Keys Consortium bearing a muffin which he asked be tested for

the presence of marijuana. (Tr. at 214-16). Respondent avers that the muffin was one (1) of a batch of muffins cooked by Ms. Dorias; two (2) of which Respondent argues he consumed on or about April 7 and 8, 2008, prior to his submission of his urine sample to Keys Consortium. (Id.).

20. That muffin was sent by Keys Consortium to ExperTox, Incorporated Analytical Laboratory in Deer Park, Texas, at Respondent's specific request, and tested by Ernest D. Lykissa, Ph.D., M.D. for the presence of THC. (Tr. 264; Resp't Ex. C).

21. Dr. Lykissa is an expert in forensic toxicology: particularly in regard to human ingestion of THC and the physiological effects of THC upon a human being. (Tr. at 262–63).

22. Dr. Lykissa's testing revealed the muffin tested "positive" for the presence of THC. (Tr. at 265–66; Resp't Ex. C).

23. Ms. Dorias testified she made a batch of muffins on or about April 6–7, 2008, and did so by placing approximately 1/4–1/2 ounce of dried marijuana leaves and stems and seeds directly into the ingredients of the baking mix. (Tr. at 159–62, 176-78).

24. The muffin tested by Dr. Lykissa contained no marijuana seeds, marijuana stems, or marijuana leaves. (Tr. at 281).

25. The muffin tested by Dr. Lykissa contained a highly-concentrated level of THC. (Tr. at 281-83). The THC in the muffin submitted by Respondent had been extracted from marijuana leaves and stems by sautéing those leaves in oil or butter prior to the addition of that oil or butter into the baking mix. (Id.). By this method, the actual marijuana leaves and stems were strained out and not included in the mix of baking ingredients. (Id.).

26. On April 11, 2008, Respondent provided a hair sample to Keys Consortium for testing. (Tr. 216–17; Resp't Ex. A). That sample was tested after September 11, 2008 and resulted in a "negative" result for the presence of THC. (Id.). That negative result was reported to Medical Review Officer Portnoy on or about September 17, 2008. (Id.).

27. Respondent testified that on April 29, June 9, August 4, and September 11, 2008, he provided urine specimens for testing. (Tr. at 18-19). Test results on the September 11th sample resulted in a "negative" result for the presence of THC. (Resp't Ex. A). No other documentary evidence was produced to verify the prior, ostensibly negative test results.

DISCUSSION

The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea. See 46 U.S.C. § 7701. Title 46 CFR § 5.19 gives Administrative Law Judges authority to suspend or revoke a license or certificate in a hearing for violations arising under 46 U.S.C. § 7704. Under section 7704(c), a Coast Guard issued license or certificate shall be revoked if the holder of that license or certificate has been a user of or addicted to a dangerous drug, unless the holder provides satisfactory proof that the holder is cured. See Appeal Decision 2634 (BARRETTA) (2002); see also Appeal Decision 2535 (SWEENEY) (1992) (*rev'd on other grounds*); see also Appeal Decision 2546 (SWEENEY) (1992) (reaffirming the definition of cure established in Appeal Decision 2535 (SWEENEY) (1992)).

The Coast Guard chemical drug testing laws and regulations require maritime employers to conduct pre-employment, periodic, random, serious marine incident, and reasonable cause drug testing to minimize use of dangerous drugs by merchant mariners. See 46 CFR Part 16.

Here, the type of drug test was a pre-employment drug test, although Respondent was not specifically required to present himself at a definite time or location for testing. (Tr. at 225-26). Marine employers (here, Respondent is self-employed) shall not employ any individual to serve as a crewmember unless the individual passes a chemical test for dangerous drugs. 46 CFR § 16.210(a). Additionally, the marine employer's drug testing program must be in accordance with the applicable statutes, regulations, and Appeal Decisions. See generally 49 CFR Part 40 and 46 CFR Part 16. If an employee fails a chemical test by testing positive for a dangerous drug, the individual is then presumed to be a user of dangerous drugs. 46 CFR § 16.201(b); see Appeal Decision 2584 (SHAKESPEARE) (1997).

Here, the Coast Guard charged Respondent with use of or addiction to dangerous drugs because Respondent tested positive for marijuana metabolite in a pre-employment drug test taken on April 8, 2008. The Coast Guard seeks revocation of Respondent's license in accordance with 46 CFR § 5.569.

For the reasons stated below, I find the Coast Guard proved Respondent is a user of a dangerous drug.

Burden of Proof

The Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559, applies to Coast Guard Suspension and Revocation trial-type hearings before United States Administrative Law Judges. 46 U.S.C. § 7702(a). The APA authorizes imposition of sanctions if, upon consideration of the entire record as a whole, the charges are supported by reliable, probative, and substantial evidence. 5 U.S.C. § 556(d). Under Coast Guard procedural rules and regulations, the burden of proof is on the Investigating Officer to prove the charges are supported by a preponderance of the evidence. 33 CFR §§ 20.701, 20.702(a). "[T]he term 'substantial evidence' is synonymous

with 'preponderance-of-the-evidence' as defined by the Supreme Court." Appeal Decision 2477 (TOMBARI) (1988). The burden of proving a fact by a preponderance of the evidence "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'" Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 622 (1993) (citing In re Winship, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring)). Therefore, the Coast Guard must prove by credible, reliable, probative, and substantial evidence that Respondent more-likely-than-not committed the violation charged.

"Congress enacted 46 U.S.C. 7704 with the express purpose of removing those individuals possessing or using drugs from service in the United States Merchant Marine." Appeal Decision 2638 (PASQUARELLA) (2003). If it is shown at a hearing that a holder of a merchant mariner's document has been a user of a dangerous drug, the merchant mariner's document shall be revoked unless the holder provides satisfactory proof that the holder is cured. 46 U.S.C. § 7704.

The Coast Guard may establish a prima facie case of dangerous drug use by showing that: (1) Respondent was tested for a dangerous drug, (2) Respondent tested positive for a dangerous drug, and (3) the test was conducted in accordance with 49 CFR Part 40. Appeal Decision 2632 (WHITE) (2002). In considering proof of these elements, minor technical infractions of the regulations do not violate due process unless the infraction breaches the chain of custody or violates the specimen's integrity. Appeal Decision 2633 (MERRILL) (2002); Appeal Decision 2603 (HACKSTAFF) (1998).

The first prong of a prima facie case "necessarily involves proof of the identity of the person providing the specimen; proof of a link between the respondent and the sample number or Drug Testing Custody and Control number which is assigned to the sample and which identifies the sample throughout the chain of custody and testing process; and proof of the testing of that sample." Appeal Decision 2603 (HACKSTAFF) (1998). The second prong requires proof the respondent tested positive for a dangerous drug, and this necessarily involves proof of the test results, proof of the MRO's status and qualifications, proof of the test results reviewed by the MRO, and proof of his report of the results as positive. Id. The Commandant has also held that the Coast Guard has made a prima facie showing of the third element when the Coast Guard introduced evidence involving the collection process, the chain of custody, how the specimen was handled and shipped to the testing facility, and proof of the qualifications of the laboratory. Id. Proof of these three (3) prongs will result in the creation of a presumption illegal drug use and shifts to the Respondent the burden to rebut the presumption by producing persuasive evidence. Appeal Decision 2632 (WHITE) (2002); Appeal Decision 2591 (WYNN) (1997); Appeal Decision 2560 (CLIFTON) (1995), appeal dismissed sub. nom. Robert E. Kramek v. Richard W. Clifton, NTSB Order No. EM-180 (1995).

However, such a presumption of dangerous drug use is not an irrebuttable presumption. The Respondent may rebut the presumption by producing evidence that: (1) calls into question any elements of the prima facie case; (2) indicates an alternative medical explanation for the positive test result; or (3) indicates the use was not wrongful or not knowing. 46 CFR § 16.201(b); Appeal Decision 2560 (CLIFTON) (1995), appeal dismissed sub. nom. Robert E. Kramek v. Richard W. Clifton, NTSB Order No. EM-180 (1995). Otherwise, the individual will be presumed to be a user of dangerous drugs. Id. If the respondent produces no evidence in

rebuttal, the Administrative Law Judge may find the allegation of dangerous drug use proved on the basis of the presumption alone. Id.

Prima Facie Case of Use of a Dangerous Drug

To reiterate, in order to establish a prima facie case of illegal drug use, the Coast Guard must first show Respondent took a drug test. Next, the Coast Guard is required to illustrate Respondent tested positive for dangerous drugs; that the test was performed by a certified laboratory; and that a MRO certified the positive test results. Finally, the Coast Guard must prove the drug test was conducted in compliance with 49 CFR Part 40.

i. Respondent took a drug test

Here, Respondent presented himself for a pre-employment drug test at Keys Consortium Drug Testing Services, Incorporated, Tavernier, Florida on April 8, 2008. (Tr. 30-31; Gov't Ex. 3). Maritza Larrazabal, a properly trained DOT certified specimen collector, acted as the collector for Respondent's April 8, 2008, drug test. (Tr. 26–27; Gov't Ex. 3). Respondent provided his urine sample to Ms. Maritza Larrazabal, who verified the sample was within the correct temperature range and then proceeded to split Respondent's sample into two (2) specimens, sealed the split specimens and properly shipped them to the DOT-approved Quest Diagnostics Laboratories for formal testing. (Tr. at 33-33; Gov't Ex. 3). Ms. Larrazabal is a properly trained and certified urine specimen collector, per 49 CFR Part 40, subpart C. (Gov't Ex. 1).

The regulations provide that a pre-employment drug test is a 46 CFR Part 16 drug test. Respondent stated, and Ms. Larrazabal confirmed, that Respondent submitted a urine specimen

for a pre-employment drug test—and Respondent's sample was sent to a DOT-approved laboratory for testing. Therefore, I find Respondent did participate in a 46 CFR Part 16 drug test.

ii. Respondent's specimen tested positive for dangerous drugs; the test was performed by a certified laboratory; and a MRO certified the positive test results.

Respondent's specimen was sent to Quest Diagnostics Laboratories for DOT testing and Respondent's specimen yielded a positive result for marijuana metabolite. (Gov't Ex. 5 at 63). Quest Diagnostics is and was a properly certified DOT-designated drug-testing laboratory. (Gov't Ex. 4).

Brad A. Brunelli is the laboratory director at Quest Diagnostics. (Tr. at 53-55). Mr. Brunelli, who is an appropriately-trained and educated toxicologist, testified that the testing performed on the specimen bearing the unique identification number 202601271089237 was conducted in strict compliance with the dictates of 49 CFR Part 40. (Tr. at 56-65). He further testified that confirmatory THC/marijuana testing on the "A" sample revealed the presence of marijuana metabolites at a level of 96.25 ng/ml; well above the DOT-specified cutoff level of 50 ng/ml, thus resulting in a positive result. (Tr. at 64; Gov't Ex. 5).

Respondent's positive results were sent to Dr. Seth Portnoy, the Medical Review Officer (MRO), so that Dr. Portnoy could review the results and inform Respondent of his failed drug test. (Tr. 64–65, 115–18). Dr. Portnoy reviewed the test results from Quest Diagnostics, contacted Respondent, and informed him his urine specimen yielded a positive result for marijuana. (Tr. at 119-21; Gov't Ex. 11). Dr. Portnoy made a specific inquiry whether there was any valid medical-legal reason why Respondent's result was positive. (Tr. at 119-21). Dr. Portnoy's inquiry of Respondent yielded no valid medical reason why Respondent's sample tested "positive" for marijuana use. (Tr. at 120).

Upon notification of the positive test result, Respondent requested his urine be re-tested. (Tr. at 122-23). Accordingly, Dr. Portnoy submitted a split sample from Respondent's original sample for testing at Advanced Toxicology Networks laboratories. (Id.; Gov't Ex. 6, 8). Dr. Portnoy later verified and certified the test result from the test performed on Respondent's split or "B" sample was also positive for marijuana metabolite. (Tr. at 122–24; Gov't Ex. 6, 7, 8, 9).

In light of the aforementioned facts, I find Respondent's specimen tested positive for dangerous drugs, the test was performed by a certified laboratory, and a properly certified MRO certified the positive test results.

iii. The drug test was conducted in accordance with 49 CFR Part 40.

Title 46 Code of Federal Regulations Section 16.201 states that all chemical testing must be conducted in accordance with 49 CFR Part 40. Here, Respondent submitted a pre-employment urine sample as required by 46 CFR Part 16. In order for Respondent's drug test to be conducted in accordance with 46 CFR Part 16, Respondent's urine specimen must have been tested in accordance with the testing requirements found in 49 CFR Part 40. In sum, the Coast Guard must prove that the collection process, the chain of custody, how the specimen was handled and shipped to the testing facility, and proof of the qualifications of the laboratory were all in accord with 49 CFR Part 40.

Dr. Stuart C. Bogema is the CEO and laboratory director at Advanced Toxicology Network in Memphis, Tennessee. (Tr. at 81-82). Dr. Bogema, who is an appropriately-trained and educated forensic toxicologist, testified the testing performed on the specimen bearing the unique identification number 202601271089237 was conducted in strict compliance with the dictates of 46 CFR Part 16 and 49 CFR Part 40. (Tr. at 81-91). Dr. Bogema further testified that confirmatory THC/marijuana testing on the "B" sample revealed the presence marijuana

metabolites at a level of 65 ng/ml; well above the DOT-specified cutoff level of 15 ng/ml. 49 CFR § 40.87. (Tr. at 91).

Here, Respondent's samples were submitted to both Quest Diagnostics and Advanced Toxicology Network laboratories. Both laboratories are DOT-certified. (Gov't 4, 10). Respondent did not challenge the laboratories procedures concerning chain of custody or the actual testing procedures. Furthermore, Respondent made no argument that he did not provide a urine specimen to Keys Consortium, that his sample did not test positive for THC, or that the testing was not performed in accordance with controlling regulations. Thus, the Coast Guard has met its burden to prove a prima facie case that Respondent illegally used dangerous drugs.

Respondent's Rebuttal

In rebuttal, Respondent argues he was the unwitting victim of a neighbor's misguided prank. Respondent provided evidence that his neighbor, Ms. Jane Dorias, provided him with three (3) marijuana-laced muffins and that he consumed two (2) of them on or about April 7 and 8, 2008, just prior to providing a urine sample to Keys Consortium on April 8, 2008. (Tr. at 208). Such rebuttal evidence can be considered at a hearing, "as long as the evidence is relevant and material, and not inherently incredible . . . ." Appeal Decision 2560 (CLIFTON) (1995). It is the responsibility of the ALJ to determine what evidence is reliable and probable and to determine how much weight particular evidence is assigned. Id.; Appeal Decision 2382 (NILSEN) (1985).

DOT drug testing regulations specify inadvertent or unknowing ingestion of illegal drugs does not constitute a legitimate medical explanation of a positive drug result. 49 CFR §40.151. However, inadvertent ingestion has been recognized as an affirmative defense in cases. See Appeal Decision 2546 (SWEENEY) (1991); see also Commandant v. Sweeny, NTSB Order No.

EM-176 (1994); see also, Administrator v. Blakey, NTSB Order No. EA5240 (2006) (FAA). Respondent bears the burden of proof and must prove any affirmative defense by a preponderance of the evidence. See 33 CFR §§ 20.701, 20.702(a).

Here, Respondent testified about his April 11, 2008 telephone conversation with the Medical Review Officer, Dr. Portnoy, wherein Dr. Portnoy told Respondent his drug test revealed "positive" for marijuana. (Tr. at 203-04). Respondent testified that after receiving this news, he took his dog for a walk and at that time, coincidentally encountered his neighbor, Ms. Jane Dorias. (Tr. at 206.). Respondent testified that during his conversation with Ms. Dorias, he gleaned he had been the unwitting victim of her prank. (Tr. at 207). Respondent testified that immediately after speaking with Ms. Dorias, he took the remaining uneaten muffin to Keys Consortium for testing. (Tr. at 216).

That muffin was then sent by Keys Consortium to ExperTox, Incorpprated Analytical Laboratory in Deer Park, Texas, at Respondent's specific request, and tested by Ernest D. Lykissa, Ph.D., M.D. for the presence of THC. (Tr. at 264; Resp't Ex. C). Dr. Lykissa is an expert in forensic toxicology, particularly in regard to human ingestion of THC and the physiological effects of that ingestion upon a human being. (Tr. at 262–63). Dr. Lykissa's testing revealed the muffin tested "positive" for the presence of THC (marijuana). (Tr. at 265–26; Resp't Ex. C).

Ms. Dorias, an admitted thirty (30) year marijuana user, testified in specific detail how she made the muffins in question. (Tr. at 159-78). She specifically testified that she placed marijuana stems, seeds and leaves directly into the rum muffin batter. (Id.). She specifically denied using any special cooking techniques in cooking the marijuana-laced muffins. She testified:

Q. And how about the addition of the marijuana to the muffin batter? Is that something that was shown to you or you learned it or you just knew it?

A. It was my own creativity.

* * *

Q. I believe Mr. Schuhmacher asked you this question, and I'm going to ask you again. Do you know exactly how much marijuana you put in the muffins?

A. No, I don't.

Q. Can you give me an estimate? Was it a handful, a cup, you know, a little Ziploc bag?

A. Maybe like so (indicating).

Q. An amount that would fit in the palm of your hand?

A. Yeah, perhaps.

* * *

Q. When you cook with marijuana is there any special procedures that you have to take or do?

A. I don't know. Not, not in this case.

Q. Tell me exactly what you did when you were blending this batter. Tell me how you did this.

A. Throw the cake mix, throw the pudding, the oil, the water, the rum, and just, you just blend it all together.

Q. So the marijuana leaves were just added into the batter and just blended in; is that correct?

A. Hmm-hmm. With everything else. All thrown in the bowl. (Emphasis added)

* * *

THE COURT: Did you put the whole baggie in the bowl?

THE WITNESS: No.

THE COURT: How much of the quantity did you put in the bowl?

THE WITNESS: Like maybe half of it.

THE COURT: All right. Let's let the record reflect that the witness is holding up the palm of her hand and kind of indicating the cupped palm of her hand.

Is that about right?

THE WITNESS: Yes.

THE COURT: All right. So maybe a quarter of an ounce?

THE WITNESS: That would probably be right.

(Tr. at 159-78).

By contrast, and under examination by Respondent's counsel, Dr. Lykissa testified there were no marijuana stems, no seeds or leaves in the muffin he examined – the same muffin

provided by Respondent and the same muffin Respondent testified that was from the batch prepared by Ms. Dorias and given to him by Ms. Dorias. (Tr. at 281). In response to Respondent's counsels' questioning, Dr. Lykissa specifically testified:

> Q. And as far as you testing this muffin, what piece of it did you actually test? You didn't dissolve the whole thing?
>
> A. No, sir. I did take representative, well representative samples. Because ***the muffin did not contain any plant material. That's why I said it was extracted in the butter. There was nothing perceptive that you could see in the muffin that would say that there was marijuana used in there. There were no seeds, there were no stems, there were no leaves. It was just flour and whatever was holding the flour together, maybe an egg or something.*** And I'm not a cook. So all I can tell you is that the marijuana that was, ***the THC, the Delta 9 THC, tetrahydrocannabinol, that was included in the muffin was definitely extracted in some oily matter and it was used in the cooking.*** (Emphasis added.)

(Tr. at 281)

The undersigned believes Respondent's "muffin defense" to be a red-herring. Ms. Dorias testified she mixed the marijuana directly into the muffin batter. Had this been the case, Dr.

Lykissa would have found evidence of stems, seeds and leaves in the sample he had tested. In fact, Dr. Lykissa found no such evidence and opined the THC in the muffin had been extracted using a technique whereby marijuana leaves would have been sautéed in oil or butter to extract the Delta 9 THC—and then the maker would have strained the remaining plant material out of the melted butter or oil and poured that into the cooking mix.

In all likelihood, the Respondent never consumed ANY muffin described by Ms. Dorias. His defense, though clever, failed to anticipate his own expert would notice that the sample muffin had NO marijuana leaves, stems or seeds – yet Ms. Dorias specifically testified she made the muffins by simply dumping a handful of marijuana directly into the ingredients before baking. In fact, she clearly testified she took no special steps (like extracting the THC from the leaves, stems, etc.) during the baking process. Ms. Dorias is without credibility in regard to her role, if any, in Respondent's ingestion of illegal drugs. Her testimony is completely undercut by Dr. Lykissa's examination of the muffin Respondent submitted for testing.

Respondent next argues that because his several subsequent urine and hair tests did not contain the THC – his ingestion of the marijuana-laced-muffin was unknowing, involuntary or unintentional. Likewise, I am not persuaded by this "evidence."

Regarding any hair sample Respondent provided for testing after April 11, 2008, I note that Respondent offered *de minimis* evidence of any such testing. Moreover, it is uncertain whether any such evidence is probative. As Dr. Stuart Bogema of Advanced Toxicology Network testified, the slow nature of hair growth – coupled with the relative insensitivity of hair testing to occasional marijuana use – renders hair testing unreliable as a means of rebuttal in the instant case. (Tr. at 106).

Regarding the urine specimens Respondent allegedly provided on April 29, June 4, August 4, and September 11, 2008; again, I am not persuaded. Other than Respondent's Exhibit "A," which relates to Respondent's September 11, 2008 urine test, Respondent offered no documentary evidence of any such testing. Thus, the only evidence presented in this regard is from Respondent's own testimony. Even though such testing is of questionable relevance relative to the April 8th positive urine sample, Respondent's position might have been bolstered with proof with documents and/or expert testimony related to those subsequent tests. Unfortunately, Respondent offered no such proof. Assuming for the sake of argument that Respondent provide the four (4) referenced samples and further assuming that each sample tested "negative" – he has still not proved that he did not illegally use marijuana in the time period prior to his April 8, 2008 test.

Finally, the undersigned questions whether a mariner, situated similarly to the Respondent, would have eaten the "happy rum muffins" under the conditions described by Ms. Dorias. Respondent and Ms. Dorias both testified that their relationship was, at best, a casual one. (Tr. at 148, 212). In fact, Respondent testified he had neither been in Ms. Dorias' house nor she in his. (Tr. at 211). Query, then, reasonableness of a person, whose livelihood depended in part upon being drug free, would risk that livelihood by eating "happy rum muffins" made by a person with whom he was not intimately or confidently familiar?

In sum, I do not find Respondent's rebuttal credible or persuasive. Hence, he has not overcome the presumption of illegal drug use laid against him by the Coast Guard's proof. He has not met the required "preponderance of the evidence" standard in proving his affirmative defense.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent and the subject mater of this hearing are properly within the jurisdiction of the United States Coast Guard and the Administrative Law Judge in accordance with 46 U.S.C. § 7704, 46 CFR Part 5, and 33 CFR Part 20.
2. On April 8, 2008, Respondent participated in a pre-employment drug test and tested positive for THC (marijuana metabolite).
3. The testing performed by Quest Diagnostics was conducted in accordance with 49 CFR Part 40.
4. The testing performed by Advanced Toxicology Network was conducted in accordance with 49 CFR Part 40.
5. Respondent's positive drug test created the presumption that he is a user of dangerous drugs.
6. Neither Respondent nor Ms. Dorias are credible regarding their allegations that Ms. Dorias prepared marijuana-laced muffins and that she gave some of those muffins to Respondent and that Respondent consumed marijuana unknowingly or unintentionally.
7. Respondent failed to rebut the presumption that he is a user of dangerous drugs.
8. The factual allegation **"USE OF A DANGEROUS DRUG"** against Respondent is found **PROVED** by a preponderance of the reliable and credible evidence and testimony as taken from the record considered as a whole.

CONCLUSION

After careful consideration of the testimony and documentary evidence offered at the hearing, and of the entire record, I find that the Coast Guard's case against Respondent is **PROVED**.

WHEREFORE,

ORDER

IT IS HEREBY ORDERED that the Merchant Mariner's Documents, Merchant Mariner's Licenses, and all other credentials issued by the U.S. Coast Guard to Kenneth Mausolf are REVOKED, per the requirements of 46 USC § 704, commencing on the date they are in the possession of the Coast Guard.

IT IS FURTHER ORDERED THAT Kenneth Mausolf is to tender his valid Merchant Mariner's Documents, Merchant Mariner's Licenses, and all other credential issued by the Coast Guard immediately to the nearest Coast Guard Marine Safety Office or mail those credentials to the following office: Marine Safety Unit Sector Key West, 100 Trumbo Point, Key West, Florida 33040.

IT IS FURTHER ORDERED THAT Kenneth Mausolf is hereby prohibited from serving aboard any vessel requiring a Merchant Mariner's Document or Merchant Mariner's License issued by the U.S. Coast Guard.

PLEASE TAKE NOTE that issuance of this Decision and Order serves as the parties' right to appeal under 33 C.F.R. Part 20, Subpart J. A copy of Subpart J is provided as Attachment B.

Done and Dated on this 10th day of November, 2008
New Orleans, LA

_____
Honorable Bruce Tucker Smith
Administrative Law Judge
United States Coast Guard

ATTACHMENT A - LIST OF WITNESSES AND EXHIBITS

I. Coast Guard's Exhibits. IO Ex. 1 through IO Ex. 13.

1. Certificate of Completion – Maritza Larrazabal
2. Excerpt from Title 49 CFR
3. Copy 3, CCF.
4. Excerpt from Federal Register, Vol 73, No. 69, Wed., April 9, 2008
5. Quest Diagnostics "Litigation Package"
6. May 13, 2008 letter from Dr. Seth Portnoy to Advanced Toxicology Network
7. Copy 1, CCF
8. Request for Retest Specimen B Bottle, Quest Diagnostics
9. Advanced Toxicology Network Report
10. Excerpt from Federal Register, Vol 73, No. 86, Friday, May 2, 2008
11. Copy 2, CCF
12. Total Compliance Network Report
13. ExperTox custody and control form

II. Respondent's Exhibits. R Ex. A through R Ex. C.

A. Total Compliance Network Report and CCF, Copy 2 Sept 11 test
B. Affidavit of Jane Dorias
C. ExperTox report on muffin testing

III. Coast Guard's Witnesses

1. Maritza Larrazabal
2. Brian A. Brunelli
3. Stuart C. Chapman
4. Seth H. Portnoy
5. Ernest D. Lykissa

IV. Respondent's Witnesses

1. Page Jane Dorias
2. Louis Caputo
3. Kenneth Don Mausolf
4. Lori Dekker

ATTACHMENT B – SUBPART J, APPEALS

33 CFR 20.1001 General.

(a) Any party may appeal the ALJ's decision by filing a notice of appeal. The party shall file the notice with the U. S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022. The party shall file the notice 30 days or less after issuance of the decision, and shall serve a copy of it on the other party and each interested person.

(b) No party may appeal except on the following issues:
  (1) Whether each finding of fact is supported by substantial evidence.
  (2) Whether each conclusion of law accords with applicable law, precedent, and public policy.
  (3) Whether the ALJ abused his or her discretion.
  (4) The ALJ's denial of a motion for disqualification.

(c) No interested person may appeal a summary decision except on the issue that no hearing was held or that in the issuance of the decision the ALJ did not consider evidence that that person would have presented.

(d) The appeal must follow the procedural requirements of this subpart.

33 CFR 20.1002 Records on appeal.

(a) The record of the proceeding constitutes the record for decision on appeal.

(b) If Respondent requests a copy of the transcript of the hearing as part of the record of proceeding, then, --
  (1) If the hearing was recorded at Federal expense, the Coast Guard will provide the transcript on payment of the fees prescribed in 49 CFR 7.45; but,
  (2) If the hearing was recorded by a Federal contractor, the contractor will provide the transcript on the terms prescribed in 49 CFR 7.45.

33 CFR 20.1003 Procedures for appeal.

(a) Each party appealing the ALJ's decision or ruling shall file an appellate brief with the Commandant at the following address: U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022, and shall serve a copy of the brief on every other party.
  (1) The appellate brief must set forth the appellant's specific objections to the decision or ruling. The brief must set forth, in detail, the --
    (i) Basis for the appeal;
    (ii) Reasons supporting the appeal; and
    (iii) Relief requested in the appeal.
  (2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record.
  (3) The appellate brief must reach the Docketing Center 60 days or less after service of the ALJ's decision. Unless filed within this time, or within another

time period authorized in writing by the Docketing Center, the brief will be untimely.

(b) Any party may file a reply brief with the Docketing Center 35 days or less after service of the appellate brief. Each such party shall serve a copy on every other party. If the party filing the reply brief relies on evidence contained in the record for the appeal, that brief must specifically refer to the pertinent parts of the record.

(c) No party may file more than one appellate brief or reply brief, unless --
  (1) The party has petitioned the Commandant in writing; and
  (2) The Commandant has granted leave to file an added brief, in which event the Commandant will allow a reasonable time for the party to file that brief.

(d) The Commandant may accept an amicus curiae brief from any person in an appeal of an ALJ's decision.

33 CFR 20.1004 Decisions on appeal.

(a) The Commandant shall review the record on appeal to determine whether the ALJ committed error in the proceedings, and whether the Commandant should affirm, modify, or reverse the ALJ's decision or should remand the case for further proceedings.

(b) The Commandant shall issue a decision on every appeal in writing and shall serve a copy of the decision on each party and interested person.

Certificate of Service

I hereby certify that I have this day served the foregoing document(s) upon the following parties and limited participants (or designated representatives) in this proceeding at the address indicated by Facsimile:

Commander,
USCG Sector Key West
Attention: MST1 Russell A. Dorin, IO
100 Trumbo Point
Key West, FL 33040
(Fax #) 305-289-9386

Hal Schuhmacher, Esq.
10887 Overseas Highway, Suite 101
Marathon, FL 33050
(Fax #) 305-289-9923

Done and dated this 10th of November, 2008 at
Baltimore, Maryland

Lauren Meus
Paralegal Specialist